In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. ~~686~~ 65

UNITED STATES OF AMERICA, *ex rel.*
STEVE AVRAMOVICH,

Petitioner,

vs.

JOHN M. LEHMANN,
Officer in Charge, Immigration and Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Now comes Henry C. Lavine, Attorney, on behalf of the petitioner, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the order of the United States District Court for the Northern District of Ohio, Eastern Division, which had denied the petitioner's application for a writ of habeas corpus.

OPINION BELOW.

The opinion of the Court of Appeals is set forth in the Appendix, *infra*, p. 11, and is reported in 235 F. 2d 260.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 1st, 1956 (App. *infra*, page 15). Petition for rehearing, timely filed, was denied on October 12, 1956 (App. *infra*, p. 15). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the petitioner had been a member of the Communist Party of the United States as that term was defined by this Court in *Galvan vs. Press*, 347 U. S. 522, or whether he has been only a "nominal" member and therefore not subject to deportation.

2. Whether, notwithstanding *Galvan vs. Press*, the statute providing for deportation of aliens for past membership in the Communist Party is unconstitutional on its face, or as applied to the facts in this case.

STATUTES INVOLVED.

Section 22 of Internal Security Act, 1950, 64 Statutes 1006-1008.

Section 22 of that Act provides, page 1008:

> "Any alien who was at the time of entering the United States, or has been at any time thereafter * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

And on page 1006:

> "* * * aliens who are members of or affiliated with (i) the Communist Party of the United States.

(2) * * *

(C) Part 4 of Section 22 of Internal Security Act of 1950.

(A) 241.(a) (6) (c). (a) Any alien in the United States shall upon the order of the Attorney General be deported who

(6) Is or at any time has been, after entry, a member of any of the following classes of aliens:

(c) Aliens who are members of or are affiliated with (1) the Communist Party of the U. S.; (2) Any other totalitarian party of the United States; (3) the Communist Political Association; (4) the Communist or any other totalitarian party of any State of the United States; of any foreign state or of any political or geographical subdivision of any foreign state; (5) any section, subsidiary branch, affiliate or subdivision of any such association or party; or (6) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: Provided, That nothing in this paragraph or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the government of the United States by force, violence or other unconstitutional means."

STATEMENT OF THE CASE.

The order of deportation in this case is under Section 22 of the Internal Security Act on the basis of past membership in the Communist Party.

The order of deportation was based entirely upon the voluntary statements which the petitioner made to the Immigration Service.

The appellant is now about 66 years old. He came to the United States from Serbia, which is now a part of

Yugoslavia, in September, 1911. He is a shoemaker by trade and conducts a shoe-repairing shop in Akron, Ohio. He has an invalid wife about 65 years old, and three children, all married, and has six grandchildren, all born in the United States. He has never before been arrested or convicted for any offense either in the United States or elsewhere. One of his sons served in World War II.

Appellant has always been a member, active in the affairs of the Serbian Orthodox Church in Akron, Ohio, and a short time before the issuance of this warrant of arrest in this case, in 1949 contributed the sum of $1000.00 to the building fund of this church in Akron.

Appellant's petition for naturalization filed in the Common Pleas Court of Summit County, Ohio, was denied in April, 1947, on the ground that his naturalization was prohibited by Section 305 of the Nationality Act of 1940, 54 Stat. 1137, 1141 (now 8 U. S. C. A. Sec. 1101 *et seq.*), by reason of his membership in the Communist Party of the United States.

The warrant of arrest in the deportation proceeding served on appellant in October, 1949, charged that he was an alien in the United States in violation of the Immigration Act of 1918 as amended, in that after entry he was a member of an organization, association, society or group advocating the overthrow by force and violence of the government of the United States. On January 17, 1950, a hearing was held before an officer of the immigration and naturalization service and testimony taken on the charges in the warrant of arrest. It appears that appellant was granted a de novo hearing on August 9, 1950, and by stipulation the transcript and exhibits of the prior hearing were made a part of the record. The de novo hearing was reopened November 29, 1950, to permit the introduction

of additional testimony, and at that time the further charge was lodged against the appellant that after his entry into the United States he had been a member of the Communist party, which membership was made a specific ground for deportation by the Internal Security Act of 1950, 64 Stat. 987, 1008.

At the conclusion of the hearings, the hearing officer of the immigration and naturalization service, on the basis of evidence presented, ordered the appellant deported to Yugoslavia. The appellant's objections to the order of deportation were overruled, his appeal to the board of immigration appeals of the department of justice was dismissed, reconsideration thereof denied, and a warrant for his deportation was issued.

From the evidence adduced at the hearings it is established that in 1935 or 1936 the petitioner joined a small workingman's group in Akron which was called the Communist Party of Akron. That he was a member of this group for about three years, when he resigned some time in 1938. That the dues were 10¢ per month, which were collected to pay for the electricity used in the different homes during the holding of these meetings, and that about eight or nine persons attended these meetings. That at no time was there any discussion of any activities involving communism or the overthrow of the government, or any other related subject, but that the only talk there was concerned how to go about obtaining more relief and more W. P. A. jobs.

That he was also a member of the International Workers Order, which was primarily handling insurance for its various members, and that the reason for his membership was because the rates for such insurance were very low. He retained his membership in the I. W. O. until he was advised by his counsel to resign.

He further gave his economic situation as a reason for joining the group called the Communist Party of Akron because, as he explained, he was living in his storeroom since he was unable to live elsewhere and the depression years of 1934 and 1935 deprived him of the ability to earn a livelihood in his trade; that several of his friends advised him to join this workingman's group in order to help him obtain the necessities of life; that he was in destitute circumstances. At that time he was supporting his wife and three growing children, and he stated quite frankly that the main purpose for joining this little Akron group was to make friends and try to get some help. (App. p. 10.)

That his membership at most was a nominal membership and resulted because of actual poverty, or economic reasons in order to obtain a livelihood as provided for in the Amendatory Statutes that where aliens had joined a proscribed organization as stated in *Galvan v. Press*, 347 U. S. 522, 74 S. Ct. 737 under (3) "to obtain the necessities of life, they were not to be deemed to have been *'members.'*"

REASONS FOR GRANTING THE WRIT.

1. This case presents the important question as to what is a "nominal member" under the qualifications in *Galvan vs. Press.*

Under the circumstances, an early decision by this Court applying the *Galvan* qualifications and indicating more specifically when an alien must be held to have been merely a "nominal member" of the Communist Party is essential for the proper administration of the Act, and will avoid protracted litigation.

2. The petitioner is to be deported solely on the ground that he was a member of this little group in Akron

which called itself the Communist Party of Akron and because the authorities decided that membership in this little group was membership in the Communist Party and that such membership was for a period of two or three years. In doing so the authorities deliberately overlooked the record which shows that his sole interest in joining this group, if it were the Communist Party, was for the sole purpose of his belief that in so doing the organization would assist him in obtaining additional relief and W. P. A. jobs, and none other. His motivation for such joinder was economic necessity and was hoping to be placed on relief.

It is our opinion that the facts in this case do not warrant the application of the decision in *Galvan v. Press* except that part of the decision which deals with the exception (3) on p. 740 of 74 Sup. Ct. which reads as follows:

> "to obtain the necessities of life, they were not to be deemed to have been 'members.' "

In any event we believe that the application of that decision to facts such as are found in the present case, are so fundamentally unfair and so devoid of a legitimate governmental purpose as to warrant determination by the Court as to whether the Statute sustained in *Galvan v. Press* can reach so far as to be constitutionally applied to the facts in this case.

CONCLUSION.

Because of our belief that the Statutory Cause for expulsion—mere membership, no matter how remote or innocent, is not reasonably connected to the objective of removing aliens, whose continued residence is injurious to our security,

The petition for a writ of certiorari should be granted.

HENRY C. LAVINE,

Attorney for Appellant.

APPENDIX.

WARRANT FOR ARREST OF ALIEN.

(Issued Sept. 23, 1949; served Oct. 19, 1949.)

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

Washington

2610—P-18993

No. A—3328855

To District Director of Immigration and Naturalization, Buffalo, New York —

Or to any Immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien STEVE AVRAMOVICH or AVERAMOVIC who entered this country at New York, New York ex SS "Europa" on the 4th day of October, 1934 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, and group that advises, advocates, and teaches the overthrow, by force and violence of the Government of the United States; and the Act of October 18, 1918, as amended, in that he was, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who is a member of an organization, association, society, and group that writes, circulates, distributes, prints, publishes, and displays any written and printed matter advising, advocating and teaching the overthrow, by force and violence, of the Government of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1950." Authority has been granted for release under bond in the sum of $2000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 23rd day of September, 1949.

W. F. KELLY

Assistant Commissioner
Enforcement Division

EXCERPT FROM HEARING, AUGUST 9, 1950.

The *Galvan vs. Press* opinion came down in 1954. The hearings in this Avramovich case began in January, 1950, four and one-half years before the opinion in the *Galvan* case. In the hearing of August 9th, 1950, undersigned counsel was examining the appellant on the question of the circumstances surrounding his joining this particular Communist Party of Akron, and his reason for joining that organization. On page 20 of the record covering that hearing, the original of which is in the file before this Court, the following sworn testimony was given:

"Q. How many people did you know there at the time you joined?

A. I didn't know anybody.

Q. Did anyone know you? You said you were introduced?

A. They knew me from the people, and they knew several people who were in my store.

Q. You mean customers?

A. Yes, sir.

Q. Was it your customers who asked you to join?

A. Yes, that's how I became acquainted with them.

Q. Did you know the ideology or the Constitution of the Communist Party when you joined?

A. No.

Q. Did anyone explain it to you?

A. No.

Q. At that time, when you joined, what was the purpose of your joining that organization?

A. Well, the main purpose, as I recall—as I have been thinking about it—was to get friends and try to get some help.

Q. What kind of help?

A. Financial, business help as I was living in a store and there was no business, naturally I accepted anything to make my living. Since the Communist Party were showing themselves as friends, I figured it would be a help to me.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided August 1, 1956.)

Before ALLEN and MILLER, Circuit Judges, and STARR, District Judge.

STARR, District Judge. Avramovich appeals from an order of the district court denying his application for a writ of habeas corpus to test the legality of the order for his deportation.

Appellant, who was born in what is now a part of Yugoslavia, first entered the United States in 1911. In 1920 he returned to Yugoslavia and remained there until 1925, when he reentered the United States. In 1931 he went to Russia as one of a group under contract with the Amtorg Trading Corporation, which represented the Russian government in the United States. While in Russia he was employed as an instructor in the making and repairing of shoes. He returned to the United States in 1934 and has resided here continuously since that time. His petition for naturalization filed in the common pleas court of Summit county, Ohio, was denied in April, 1947, on the ground that his naturalization was prohibited by § 305 of the Nationality Act of 1940, 54 Stat. 1137, 1141, by reason of his membership in the Communist Party of the United States.

The warrant of arrest in the deportation proceeding served on appellant in October, 1949, charged that he was an alien in the United States in violation of the Immigration Act of 1918 as amended, in that after entry he was a member of an organization, association, society or group advocating the overthrow by force and violence of the government of the United States. On January 17, 1950, a hearing was held before an officer of the immigration

and naturalization service and testimony taken on the charges in the warrant of arrest. It appears that appellant was granted a de novo hearing on August 9, 1950, and by stipulation the transcript and exhibits of the prior hearing were made a part of the record. The de novo hearing was reopened November 29, 1950, to permit the introduction of additional testimony, and at that time the further charge was lodged against the appellant that after his entry into the United States he has been a member of the Communist party, which membership was made a specific ground for deportation by the Internal Security Act of 1950, 64 Stat. 987, 1008.

At the conclusion of the hearings, the hearing officer of the immigration and naturalization service, on the basis of evidence presented, ordered the appellant deported to Yugoslavia. The appellant's objections to the order of deportation were overruled, his appeal to the board of immigration appeals of the department of justice was dismissed, reconsideration thereof denied, and a warrant for his deportation was issued.

On July 23, 1954, appellant filed an application in the district court for the writ of habeas corpus, in which he claimed, among other things, that he was not a member of the Communist party; that the hearings on the charges against him were unfair; and that the action of the attorney general in issuing the warrant of deportation was arbitrary, capricious, contrary to law, and in violation of his constitutional rights. In his return to the application for the writ, the officer in charge of the immigration and naturalization service at Cleveland, Ohio, alleged that appellant was afforded full, complete, and fair hearings, and that the order and warrant of deportation were based upon substantial evidence. At the conclusion of the hearing the district court denied appellant's application for the writ, and he appeals.

The only question presented on this appeal is whether the evidence adduced in the deportation proceeding was sufficient to sustain the order of deportation issued pursuant to the provisions of the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008. Section 22 of that act provides, page 1008:

> "Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

Section 22, 64 Stat. at page 1006, lists "aliens who are members of or affiliated with (i) the Communist Party of the United States." It appears that the foregoing provisions of the Internal Security Act of 1950 were in substance and effect incorporated into the Immigration and Nationality Act of 1952, 8 U. S. C. § 1251(a) (6) (C).

The evidence adduced at the hearings in the deportation proceeding, particularly appellant's own testimony, clearly established that in 1935 he joined the Communist party in Akron, Ohio, of his own free will and remained a member until 1938 or 1939; that he had a membership book indicating that he was a member of the party; that he paid dues; that he attended party meetings; that one or two party meetings were held in his store; and that he assisted a Communist party candidate in getting signatures on his election petition. He testified in substance that he supposed the Communist party in Akron which he joined was the Communist Party of the United States, and that he quit the party when he feared he would not obtain citizenship in the United States unless

he quit. It also appears from his own testimony that he joined the International Workers Order, an organization designated by the attorney general as subversive and under Communist domination; that while he was a member of the Serbian group of the International Workers Order, he served as minute secretary, financial secretary, president, and trustee; and that he remained an active member of that organization until he was advised by his attorney to resign, after he had been taken into custody in the deportation proceeding. In summary, appellant by his own testimony placed himself in the class of aliens subject to arrest and deportation upon the warrant and order of the attorney general.

The decision of the Supreme Court in *Galvan v. Press*, 347 U. S. 522, is controlling on the issues as to the sufficiency of the evidence and the validity of the warrant of deportation in the present case. In the *Galvan* case the court held section 22 of the Internal Security Act of 1950 constitutional, and said in part, page 528:

> "It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end."

See also *Rowoldt v. Perfetto*, 8 Cir., 228 F. (2d) 109.

In the present case there was substantial evidence that appellant was an active member of the Communist Party

of the United States, and under the provisions of the Internal Security Act of 1950 his deportation was mandatory. We recognize that deportation is a drastic measure, *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10, and that the deportation of appellant will undoubtedly cause him and his family sorrow and hardship. However, the formation of our national policies regulating the entry and deportation of aliens is entrusted exclusively to the Congress, and it is not within the scope of the judiciary to question the wisdom of the Congress in providing for the deportation of certain classes of aliens. As said by Justice Jackson in *Harisiades v. Shaughnessy*, 324 U. S. 580, 590, "Judicially we must tolerate what personally we may regard as a legislative mistake."

The order of the district court denying the appellant's application for the writ of habeas corpus is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered August 1, 1956.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause denying the appellant's application for the writ of habeas corpus be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING.

(Entered October 12, 1956.)

The appellant's petition for rehearing is denied.